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Supreme Court, U.S.
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No. 00-28

In The

Supreme Court of the United States

L. B. SIMMONS ENERGY, INC.
d/b/a ROCKET OIL COMPANY, *et al.*,

Petitioners,

v.

KOCH INDUSTRIES, INC., *et al.*

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This case squarely presents the Court the chance to resolve the 8-3 intercircuit split, recognized by three circuits,[1] as to whether *Kotteakos*'s harmless-error standard applies in cases of civil trial error. Respondents essentially concede the existence of the inter-circuit split, but try to circumvent that split by mis-stating the Tenth Circuit's opinion to say that the error was being found harmless under a standard other than the one the Court of Appeals said it was using. If the Tenth Circuit's opinion were read to rely on an actual causation standard, rather than the "influence" standard used by the *Kotteakos* Court, the Tenth Circuit's analysis would be even more inconsistent with *Kotteakos* and the eight majority circuits. The improperly-admitted evidence in question, moreover, was admitted by the district court with an express finding that the evidence was "central" to the defense of the case. And the district court's error, by impacting the owner of the largest bloc of plaintiffs' stock in Koch Industries and a key person in the negotiations, impacted all of the plaintiffs.

1. The Tenth Circuit did *not* hold it was "extremely doubtful" that the wrongly-admitted evidence "affected" the verdict.

Although the question of whether the Court should grant certiorari to resolve an acknowledged 8-3 split in the circuits is distinct from deciding a particular case on the merits,[2]

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[1] *See Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 n.10 (4th Cir. 1999) (en banc), *cert. denied*, 120 S.Ct. 1243 (2000); *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1023 (D.C. Cir. 1990); *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 & n.39 (10th Cir. 1988).

[2] Defendants argue that review is "inappropriate and unwarranted" because they contend the Court should affirm the Tenth Circuit's decision regardless of the harmless-error analysis used. *See* Brief for the Respondents in Opposition 1. But the Court has granted certiorari to resolve a circuit split, resolved a split by announcing the

Defendants at least three times suggest that the Tenth Circuit found it was "extremely doubtful" that the erroneously-admitted evidence "*affected* the jury's verdict."[3] But the Tenth Circuit actually wrote it could not reasonably conclude the jury *would have found* for the plaintiffs had they not learned about the inadmissible evidence and then went on to say that it was "extremely doubtful" that the evidence "*caused* the jury to find for the Defendants."[4]

> When a trial court erroneously receives evidence, this court will reverse the jury's verdict only if the error prejudicially affects a substantial right of a party.' This court deems such wrongly admitted evidence prejudicial *only if we reasonably conclude that the jury would have reached a different result without that evidence.* Having reviewed the transcript of this trial, this court cannot reasonably conclude that the jury would have found for the Plaintiffs had it not learned of these other lawsuits. In the context of this eleven week trial, it is

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applicable rule, and remanded the case with instructions for a lower court to apply the rule in a case. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165, 169 (1993); *see also, e.g., Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 519, 525-26 (1986) (granting certiorari because of the importance of the issue and remanding for the district court to apply the new analysis in the first instance). The Court has also granted certiorari on a question to resolve a split, even though it eventually affirmed the judgment in the particular case. *See, e.g., Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 524-25 (1984); *see also, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, 42 (1991) (granting certiorari because of the importance of the issues raised and affirming).

[3] Brief for the Respondents in Opposition 1-2, 9, 10-11 (emphasis added).

[4] L.B. Simmons Pet. App. 52 (emphasis added) (*Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1228 (10th Cir. 2000)).

> extremely doubtful that the lone, brief colloquy between defense counsel and William about suing his brothers and mother and one passing mention of this evidence in the Defendants' opening statement *caused* the jury to find for the Defendants.[5]

In contrast, *Kotteakos*'s analysis asks whether an error influenced or had more than an "influence" or "very slight effect" on a verdict:

> If, when all is said and done, the conviction is sure that the error did not *influence* the jury, or had but *very slight effect*, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially *swayed* by the error, it is impossible to conclude that substantial rights were not affected.[6]

Causation is a much different standard than influence, effect, or sway, especially in this type of case where the improperly-admitted evidence as to suing one's own mother also raises prejudicial, emotional factors apart from the elements of the cause of action.[7]

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[5] L.B. Simmons Pet. App. 51-52 (emphases added) (internal citation omitted) (*Koch*, 203 F.3d at 1228).

[6] *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (citations omitted) (emphases added).

[7] *See* Roger J. Traynor, *The Riddle of Harmless Error* 18-29 (1970) (determining whether substantial evidence supports the verdict is not the same as whether an error affected or influenced a party's substantial rights). Courts reverse when irrelevant but prejudicial

2. If the Tenth Circuit's opinion were construed to equate "causation" with "influence," the opinion would be even more inconsistent with *Kotteakos* and the eight circuits that follow that opinion.

If the Tenth Circuit's application of the *Kotteakos* standard were construed to place an appellate court in the position of trying to second-guess what caused the jury to find as it did, rather than weighing what "sway" or "influence" the evidence might have had, the Tenth Circuit opinion would be even more clearly in conflict with this Court's *Kotteakos* opinion. That causation analysis thus would be an additional aspect of the inter-circuit conflict for this Court to consider, along with the Tenth Circuit's use of a probability rather than the much higher "conviction is sure" standard used in *Kotteakos*.[8]

3. The erroneous admission of the evidence was based on the district court's finding that evidence was "central" to the case.

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evidence affecting a party's case is admitted before a jury. *See, e.g., Caparotta v. Entergy Corp.*, 168 F.3d 754 (5th Cir. 1999) (reversing admission of evidence concerning document destruction as clearly prejudicial, and thus harmful, despite its marginal relevance); *Bonilla v. Yamaha Motors Corp.*, 955 F.2d 150 (1st Cir. 1992) (reversing admission of irrelevant speeding tickets in a products liability case arising from a motorcycle accident as highly prejudicial and inherently harmful).

[8] Respondents try to twist the Simmons Plaintiffs' description of the Third Circuit's interpretation of *Kotteakos* to be a concession that the standard should be a "high probability" standard. *See* Brief for the Respondents in Opposition, at 7. Respondents misread the Simmons Plaintiffs' position. *Kotteakos* used a "conviction is sure that the error did not influence the jury, or had but very slight effect" standard. The Simmons Plaintiffs obviously do not concede that that standard should be equated to anything weaker.

No matter how the Tenth Circuit or this Court were to apply *Kotteakos* to this case, it is clear that the evidence had a significant impact on the trial. The district court did not simply rule that the evidence of the lawsuits, including the fact that the lead plaintiff William Koch even "sued his own mother," was admissible. The district court stated any exclusion of the evidence would "eviscerate the defendants' case" because of the impact of the evidence on the issues of William Koch's motivation in filing suit, whether he relied on the defendants in the 1983 transaction, and his credibility as a fact witness.[9]

At the defendants' urging, the district court below rejected precisely the argument that the defendants make now before this Court — that the post-1985 lawsuits were really not that important to the defendants' case.[10] Defendants gained the admission of the evidence precisely because it was "central to the defendants' case in several regards."[11]

4. The erroneously-admitted evidence adversely impacted all of the Petitioners.

Despite the length of the trial and the quantity of other evidence presented at trial, evidence about William Koch was important because he was the largest and a key shareholder in

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[9] William I. Koch Pet. App. B11-12 (*Koch v. Koch Indus., Inc.*, 2 F. Supp.2d 1385, 1391-92 (D. Kan. 1998)).

[10] *See* William I. Koch Pet. App. C5-9 (denying plaintiffs' motion to reconsider denial of their motion *in limine* on the post-1985 lawsuits) ("A plain reading of those matters [pleadings and discovery orders] along with a detailed review of this case's procedural history would leave most with the impression that the litigation is occurring in the shadows of issues that are much larger and more personal for the parties.") (*Koch v. Koch Indus., Inc.*, 6 F. Supp.2d 1207, 1209-1211 (D. Kan. 1998)).

[11] William I. Koch Pet. App. B12 (*Koch*, 2 F. Supp.2d at 1391).

the plaintiffs' bloc of stock in Koch Industries and was at the forefront of the negotiations leading up to plaintiffs' sale of stock to the company in 1983. William Koch was also a trustee of fourteen of the sixteen Simmons family trusts holding claims brought by these Petitioners in the lawsuit. Irrelevant evidence[12] that disparaged William Koch, therefore, spread to every plaintiff in the case.

[12] The Tenth Circuit held that the district court should have excluded the evidence as irrelevant. *See* L.B. Simmons Pet. App. 49-50 (*Koch*, 203 F.3d at 1228).

Respectfully submitted,

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